

SENATE BILL 9064

By Bowling

AN ACT to amend Tennessee Code Annotated, Title 29, Chapter 26; Title 50, Chapter 6; Title 53, Chapter 1 and Title 68, relative to the COVID-19 Health Care Liberty Jurisdiction Act.

WHEREAS, United States Supreme Court Justice Joseph Story, in section 416 of his famed *Commentaries on the Constitution of the United States*, stressed the importance of our system of federal and state sovereigns with the words:

Each, by the theory of our government, is essential to the existence and due preservation of the powers and obligations of the other. The destruction of either would be equally calamitous, since it would involve the ruin of that beautiful fabric of balanced government, which has been reared with so much care and wisdom, and in which the people have reposed their confidence, as the truest safeguard of their civil, religious, and political liberties[;]

and

WHEREAS, the United States Supreme Court, in its unanimous decision in *Bond v. United States*, 564 U.S. 211, 221-22 (2011), extolled the importance of our nation's system of dual sovereigns as follows:

Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. (internal citations omitted) . . . [It] protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions[;]

and

WHEREAS, in *Martin v. Hunter's Lessee*, 14 U.S. 304, 325 (1816), the United States Supreme Court said of the system of dual sovereigns created by the United States Constitution that "the sovereign powers, vested in the state governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States"; and

WHEREAS, the Preamble to the Bill of Rights states that its purpose was to set forth "further declaratory and restrictive clauses" in order "to prevent misconstruction or abuse" of the federal government's enumerated powers; and

WHEREAS, the Ninth Amendment guarantees the people of Tennessee that the "enumeration of certain rights, in the Constitution shall not be construed to deny or disparage others retained by the people"; and

WHEREAS, according to the stated purpose of the Bill of Rights, the Ninth Amendment operates as a constitutional limitation on the construction of the powers of the federal government relative to the rights that were enumerated as well as the "others" retained by the people; and

WHEREAS, the General Assembly recognizes that in *Marbury v. Madison*, 5 U.S. 137, 174 (1803), the Court said "it cannot be presumed that any clause in the constitution is intended to be without effect"; and

WHEREAS, the Ninth Amendment's guarantee places the enumerated rights as well as the "others" retained by the people outside the powers of the federal government; and

WHEREAS, a source of those other rights is the common law; and

WHEREAS, the United States Supreme Court has repeatedly looked to the common law for its interpretation of rights enumerated in the Bill of Rights and for incorporating rights in the Bill of Rights into the provisions of the Fourteenth Amendment's Due Process Clause; and

WHEREAS, a few examples of the Court's reliance on common law to interpret the U.S. Constitution from recent years include *Gamble v. United States*, 139 S. Ct. 1600 (2019) (citing Blackstone multiple times to determine the meaning of the phrase "the same offense" in the Fifth Amendment's double jeopardy clause); *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1599, 1609 (2020) (calling Blackstone's *Commentaries* a "satisfactory exposition of the common law of England"); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) (citing Blackstone in explanation of the holding that the requirement of juror unanimity is "a vital right protected by the common law" and therefore the Constitution's jury trial guarantee); and *Torres v. Madrid*, 141 S. Ct. 989, 996-1000 (2021) (citing Blackstone multiple times to determine meaning of Fourth Amendment "seizure"); and

WHEREAS, rights at common law were private rights and, as such, it was not only the duty of civil government not to violate them, but affirmatively to secure them from violation by other persons; and

WHEREAS, pursuant to the Tenth Amendment, the General Assembly, as representatives of the people, has the power, not abrogated by the Fourteenth Amendment, to secure to the people those rights they possessed prior to ratification of the United States Constitution; and

WHEREAS, the rights the people had prior to and retained after ratification of the United States Constitution were the rights of persons at common law; and

WHEREAS, as to common law, the United States Supreme Court has said Blackstone's *Commentaries* "not only provided a definitive summary of the common law but was also a primary legal authority for 18th- and 19th--century American lawyers," *Washington v. Glucksberg*, 521 U.S. 702, 712 (1997), and further said they "constituted the preeminent authority on English law for the founding generation," *District of Columbia v. Heller*, 554 U.S. 570 (2008) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)); and

WHEREAS, in *Schick v. United States*, 195 U.S. 65, 69 (1904), the Court wrote that Blackstone's *Commentaries* "are accepted as the most satisfactory exposition of the common law of England"; and

WHEREAS, according to Blackstone's *Commentaries*, at common law the "absolute rights" of persons consisted of "the three great and primary rights of personal security, personal liberty, and private property"; and

WHEREAS, according to Blackstone's *Commentaries*, "[t]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation," and:

[b]esides those limbs and members that may be necessary to a man in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member[;]

and

WHEREAS, Blackstone described "injuries which affect the personal security of individuals" as "either injuries against their lives, their limbs, their bodies, their health, or their reputations"; and

WHEREAS, Blackstone said "battery" was among the injuries "affecting the limbs or bodies of individuals"; and

WHEREAS, Blackstone said:

The least touching of another's person willfully (sic), or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner[;]

and

WHEREAS, the requirement of informed consent in regard to medical practices and procedures is consistent with the common law right of every person to personal security and the liberty to be free from unwanted touching or contact by another person, whether or not the medical practice or procedure is conducive to personal health; and

WHEREAS, in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), the Supreme Court said, "[t]he authority of the State to enact [a] statute" authorizing local governments to require a smallpox vaccination of local residents was within "what is commonly called the police power — a power which the State did not surrender when becoming a member of the Union under the Constitution"; and

WHEREAS, the Court supported its decision in *Jacobson* by citation to *Ogden v. Utah*, 22 U.S. 1, 203 (1824) in which the Court said "Inspection laws, quarantine laws, [and] health laws of every description" were left to the powers of the state and "[n]o direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation"; and

WHEREAS, no power to regulate health and medical practices was "delegated to the United States by the Constitution, nor prohibited by it to the States," such power was "reserved to the States respectively, or to the people" by the Tenth Amendment; and

WHEREAS, the legislature has a duty to specify and protect those "other rights" reserved by the Ninth Amendment to the people of Tennessee, one of which is the right of persons at common law to personal security, and, pursuant to the Tenth Amendment, has the power to discharge its duty; and

WHEREAS, approval of a pharmaceutical by the federal Food and Drug Administration (FDA) does not require that an approved pharmaceutical be administered to any person and no person can be required to take any such pharmaceutical by virtue of FDA approval; and

WHEREAS, the FDA approves pharmaceuticals that have what is known as a clinical benefit for which the pharmaceutical has been shown to have a positive therapeutic effect that is clinically meaningful, whereas other pharmaceuticals are given fast track approval pursuant to Section 901 of the Food and Drug Administration Safety Innovations Act (FDASIA) based on the substitution of a surrogate endpoint evaluation for a clinical benefit; and

WHEREAS, the Centers for Disease Control and Prevention (CDC) defines a "vaccine" as "a product that stimulates a person's immune system to produce immunity to a specific disease, protecting the person from that disease"; and

WHEREAS, the CDC defines "immunity" as "[p]rotection from an infectious disease," meaning that, "[i]f you are immune to a disease, you can be exposed to it without becoming infected"; and

WHEREAS, the actual patents for mRNA COVID-19 injections submitted by Pfizer and Moderna describe the injections as "gene therapy," not vaccines; and

WHEREAS, mRNA COVID-19 shots are not vaccines as defined by the CDC, and any representation of them as vaccines constitutes a false advertisement under 15 U.S.C. § 52; and

WHEREAS, the executive branch of the federal government has intimated that it will impose by rule, regulation, or policy a requirement that employers in this State with a certain number of employees will be required to have some or all of their employees submit to a subcutaneous injection of one (1) or more drugs related to COVID-19, as designated by the World Health Organization, that have not been shown to have a clinical benefit; and

WHEREAS, according to the FDA, as accessed at <https://www.fda.gov/patients/fast-track-breakthrough-therapy-accelerated-approval-priority-review/accelerated-approval>:

Approval of a drug may be withdrawn or the labeled indication of the drug changed if trials fail to verify clinical benefit or do not demonstrate sufficient clinical benefit to justify the risks associated with the drug (e.g., show a significantly smaller

magnitude or duration of benefit than was anticipated based on the observed effect on the surrogate)[;]

and

WHEREAS, a number of Tennesseans are concerned about the long-term consequences of a COVID-19 injection that has not been shown to have a clinical benefit; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act is known and may be cited as the "COVID-19 Health Care Liberty Jurisdiction Act."

SECTION 2. Title 68, Chapter 5, is amended by adding the following as a new part 3:

68-5-301. The general assembly finds:

(1) No power to regulate health and medical practices was delegated to the federal government by the United States Constitution, and the United States Constitution does not prohibit the states from regulating health and medical practices;

(2) No power to require any person to consent to any form of medical treatment was granted, directly or indirectly, to the federal government under the United States Constitution;

(3) The right to personal security and the liberty to be free from an unwanted touching of one's limbs and body at common law was retained by the people of this state;

(4) The right of a person at common law includes rights and duties with respect to medical treatment administered by other persons with respect to the person's body, limbs, and health;

(5) Informed consent between patients and healthcare practitioners protects the rights at common law of persons and all such consent must be voluntary and not given under duress, coercion, misrepresentation, or fraud;

(6) The general assembly has a duty to protect the right of personal security and liberty from an unwanted touching of one's body and limbs at common law from any asserted power by the federal government that would tend to direct or control the actions of persons in this state with respect to their personal healthcare decisions; and

(7) Imposing a requirement that a person submit or consent to a subcutaneous injection of one (1) or more drugs related to COVID-19, as designated by the World Health Organization, and approved based on a surrogate endpoint evaluation rather than a clinical evaluation, violates the requirement of informed consent essential to the preservation of a person's right to personal security and liberty.

68-5-302. An employer or any place of public accommodation, resort or amusement, as defined in § 4-21-102, shall not require a person to submit or consent to or receive a subcutaneous injection of one (1) or more drugs related to COVID-19, as designated by the World Health Organization, or any variant thereof, and approved based on a surrogate endpoint evaluation rather than a clinical evaluation.

SECTION 3. Tennessee Code Annotated, Section 53-1-103(a), is amended by adding the following as new subdivisions:

() The suggestion by any person that a person is or may be required by a rule, regulation, or policy of the federal government to submit or consent to or receive a subcutaneous injection of one (1) or more drugs related to COVID-19, as designated by the World Health Organization, or variant thereof, particularly as a condition of continued

employment or of engaging in any economic or commercial activities carried on in this state;

() The manufacture, sale, delivery, holding, or offering for sale, or the administration of any one (1) or more drugs related to COVID-19, as designated by the World Health Organization, or variant thereof, as a vaccine unless it stimulates a person's immune system to produce immunity to COVID-19 such that a person can be exposed to it without becoming infected with COVID-19;

SECTION 4. Tennessee Code Annotated, Section 50-6-103, is amended by adding the following as a new subsection:

() This chapter does not apply to any injury to or economic loss suffered by any employee resulting from a subcutaneous injection of one (1) or more drugs related to COVID-19, as designated by the World Health Organization, or variant thereof, taken by or administered to an employee upon a representation by the employer, express or implied, that such treatment is or may be required as a condition of employment and regardless of any rule, regulation, or policy of the federal government applicable to the employer.

SECTION 5. Tennessee Code Annotated, Section 29-26-118, is amended by designating the existing language as subsection (a) and by adding the following as a new subsection:

(b) Informed consent is not obtained for a subcutaneous injection of one (1) or more drugs related to COVID-19, as designated by the World Health Organization, or any variant thereof, if:

(1) The defendant knows or reasonably should know that the plaintiff has requested the injection because the plaintiff believes it is or may be required as a

condition of employment or by a rule, regulation, or policy of the federal government imposed upon the plaintiff's employer; or

(2) The defendant, in the presence of the plaintiff, describes, refers to, or implies that the injection is a vaccine or will protect the plaintiff from contracting COVID-19, or any variant thereof, if exposed to COVID-19.

(c) Subsection (b) does not apply if the defendant obtains in writing from the plaintiff a statement that the injection is not related to a requirement of an employer or a condition of employment and that the plaintiff has been informed by the defendant that the injection is not a vaccine that will protect the patient from contracting COVID-19.

SECTION 6. This act takes effect upon becoming a law, the public welfare requiring it.